4-7-2016

State v. Dias Appellant's Brief Dckt. 43495

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 43495**
Plaintiff-Respondent,	)	
	)	**ADA COUNTY NO. CR 2014-10328**
v.	)	
	)	
KEVIN SCOTT DIAS,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
_____	)	

_____

BRIEF OF APPELLANT

_____

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

_____

HONORABLE SAMUEL A HOAGLAND
District Judge

_____

SARA B. THOMAS
State Appellate Public Defender
State of Idaho
I.S.B. #5867

REED P. ANDERSON
Deputy State Appellate Public Defender
I.S.B. #9307
P.O. Box 2816
Boise, ID 83701
(208) 334-2712

ATTORNEYS FOR DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR PLAINTIFF-RESPONDENT

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STATEMENT OF THE CASE

Nature of the Case

Kevin Scott Dias appeals from the district court's judgment of conviction entered pursuant to a conditional guilty plea following the denial of his motion to suppress evidence. In the district court, Mr. Dias asserted that, following a traffic stop, the search of his car exceeded the scope of his consent when the officer asked to "just take a quick look" in his car but then opened and searched his fanny pack, which was in the back seat. The district court denied the motion to suppress, and Mr. Dias entered a conditional plea of guilty to one count of possession of a controlled substance with the intent to deliver, which preserved his right to appeal the denial of his motion to suppress. Mr. Dias asserts that the district court erred in denying the motion to suppress, as the warrantless search violated his constitutional rights pursuant to the Fourth Amendment of the United States Constitution and Article I, § 17 of the Idaho Constitution.

Statement of the Facts and Course of Proceedings

On July 18, 2014, Mr. Dias was stopped by Boise Police Officer Miller for failing to come to a complete stop at a stop sign. (Tr. 9/3/14, p.2, L.18 – p.3, L.24.)[1] Officer Miller said that because Mr. Dias seemed nervous, he asked him to get out of his car. (Tr. 9/3/14, p.8, Ls.4-10.) He then asked if he could search Mr. Dias, and Mr. Dias consented. (Tr. 9/3/14, p.8, Ls.11-15.) After finding no contraband on his person, Officer Miller told Mr. Dias to go back with him to his police car and take a seat on the

[1] For purposes of the suppression motion, the parties stipulated to the facts as presented at the preliminary hearing. (Tr. 3/27/15, p.5, L.11 – p.6, L.9.)

bumper. (State's Exhibit 2 (Audio recording of the traffic stop (*hereinafter*, Audio)) at 13:10 – 13:20.) Officer Miller testified that he then continued to question Mr. Dias about why he was nervous, and Mr. Dias told him that he had not had good interactions with the police in the past. (Tr. 9/3/14, p.9, Ls.6-13.)

Officer Miller then asked Mr. Dias if he had anything illegal in the vehicle and asked if he could "just take a quick look" to see if there was anything in the car. (Tr. 9/3/14, p.18, Ls.1-5.) Specifically, Officer Miller said, "Is there anything in that car I need to be aware of tonight man, no weed or nothing like that? Anything illegal? Is it okay if I just take a quick look at it? Look inside? Is that cool?" (Audio at 13:35 – 13:45.) Mr. Dias said "Yeah." (Audio at 13:40 – 13:45.) Once he had Mr. Dias's consent to "just take a quick look," Officer Miller searched the car and opened a fanny pack located behind the driver's seat. (Tr. 9/3/14, p.9, L.22 – p.10, L.16) While searching through the contents of the fanny pack, Officer Miller found methamphetamine, spice, oxycodone, and drug paraphernalia. (Tr. 9/3/14, p.10, L.18 – p.11, L.13.)

Mr. Dias was initially charged with three counts of possession of a controlled substance with the intent to deliver and one misdemeanor charge of possession of drug paraphernalia. (R., pp.45-46.) He filed a motion to suppress the evidence in which he argued that Officer Miller's actions exceeded the scope of his consent because giving an officer permission to "just take a quick look" does not "involve a touch, much less an opening, of any containers in the vehicle." (R., pp.82-84.) The district court denied the motion. (R., pp.102-10.) It said, "Based on the context of the interaction between Officer Miller and Defendant, a reasonable person would likely have understood that

Officer Miller was going to search for 'weed' or anything 'like that' in the car." (R., p.109.) It then held that Officer Miller "did not exceed the scope of [Mr. Dias's] consent by searching the fanny pack, because: (1) a reasonable person would have understood from the exchange that Officer Miller intended to search for drugs, and (2) [Mr. Dias] did not limit the scope of his consent." (R., p.110.)

Subsequently, Mr. Dias entered a conditional guilty plea to one count of possession of a controlled substance with the intent to deliver and one misdemeanor charge. (R., pp.116, 130; Tr. 4/30/15, p.51, L.19 – p.55, L.25.) The district court imposed a sentence of ten years, with two years fixed, but retained jurisdiction so that Mr. Dias could participate in a Rider program. (R., p.131.) Mr. Dias filed a Notice of Appeal that was timely from the district court's judgment of conviction. (R., pp.136-39.)

ISSUE

Did the district court err when it denied Mr. Dias's motion to suppress?

ARGUMENT

The District Court Erred When It Denied Mr. Dias's Motion To Suppress

A. Introduction

The district court erred in denying Mr. Dias's suppression motion because a reasonable person would not understand that Mr. Dias's consent to Officer Miller's request to "just take a quick look" in his car included consent for Officer Miller to search the car and its closed containers. Therefore, the court's conclusion that the search was within the scope of Mr. Dias's consent was in error. Furthermore, in this case, Mr. Dias could probably not have objected to the scope of the search because Officer Miller told Mr. Dias to sit on the front bumper of his police car during the search, so there was likely no way for Mr. Dias to see what Officer Miller was doing. Therefore, Mr. Dias could not have known when to object.

B. Standard Of Review

In reviewing a ruling on a motion to suppress, this Court employs a bifurcated standard. *State v. Abeyta*, 131 Idaho 704, 708 (Ct. App. 1998). The Court accepts the trial court's determination of fact if supported by substantial evidence and freely reviews "the application of constitutional principles to the facts as found." *Id.* Thus, the Court should review *de novo* whether the police officer's actions were permitted under the Fourth Amendment to the United States Constitution and Article I, Section 17 of the Idaho Constitution. *State v. Pick*, 124 Idaho 601, 604 (Ct. App. 1993).

C. The District Court Erred When It Denied Mr. Dias's Motion To Suppress Because A Reasonable Person Would Not Understand That Consent To An Officer's Request To "Just Take A Quick Look" In A Car Would Lead To A Full Search Of The Car And The Contents Of Its Closed Containers

The Fourth Amendment to the United States Constitution, and Article I, Section 17 of the Idaho Constitution protect "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable *searches* and seizures." U.S. CONST. AMEND. IV; IDAHO CONST. art. 1, § 17 (emphasis added). The purpose of this constitutional right is to "impose a standard of reasonableness upon the exercise of discretion by governmental agents and thereby safeguard an individual's privacy and security against arbitrary invasions." *State v. Maddox*, 137 Idaho 821, 824 (Ct. App. 2002). When evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure. *Illinois v. Krull*, 480 U.S. 340, 347 (1987) (citing *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914)).

Searches or detentions conducted without a warrant are presumptively unreasonable. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971); *State v. Butcher*, 137 Idaho 125, 129 (Ct. App. 2002). Consent to search, however, "is one of the recognized exceptions to the warrant requirement." *State v. Hansen*, 138 Idaho 791, 796 (2003). The government bears the burden of proving a warrant was not necessary. *Id.* And "the burden is on the State to prove . . . that the consent was given and that such consent was knowing and voluntary." *State v. Harwood*, 94 Idaho 615,

618 (1972)[2] (citing *State v. Douglas*, 488 P.2d 1366 (Or.1971); *Johnson v. United States*, 333 U.S. 10 (1968)) (*Harwood* abrogated on other grounds by *State v. Culbertson,* 105 Idaho 128, 130 (1983) as recognized by *State v. Harris*, 130 Idaho 444, 447 (Ct. App. 1997)). Further, "when the basis for a search is consent, the government must conform to the limitations placed upon the right granted to search." *State v. Thorpe*, 141 Idaho 151, 154 (Ct. App. 2004) (citing *United States v. Ward,* 576 F.2d 243, 244 (9th Cir. 1978); *Mason v. Pulliam*, 557 F.2d 426, 429 (5th Cir. 1977).

"The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness — what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (citing *Illinois v. Rodriguez*, 497 U.S. 177 (1990); *Florida v. Royer*, 460 U.S. 491 (1983)). As such, like other consent issues, a totality of the circumstances analysis is appropriate. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973); *State v. Jaborra*, 143 Idaho 94, 97 (Ct. App. 2006).

In this case, the totality of the circumstances would not lead a reasonable person to believe that Mr. Dias consented to a search of the containers in his car. First, Officer Miller did not seek permission to thoroughly search the car's contents. Rather, Officer Miller simply asked Mr. Dias the following: "Is it okay if I just take a quick look at it? Look inside? Is that cool?" (Audio at 13:35 – 13:45.) Mr. Dias said "Yeah." (Audio at

[2] *Harwood* preceded *Shneckcloth v. Bustamonte*, 412 U.S. 218 (1973). In *Bustamonte*, the United States Supreme Court held that "while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent." *Id*. at 249. *Bustamonte*, however, did not eliminate the requirement that a person must know what he is consenting to.

13:40 – 13:45.) The reasonable person observing this exchange would not have understood that Mr. Dias's consent to Officer Miller's request to "just take a quick look at" the inside of the car included consent to a thorough search of the car and the contents of its closed containers.

Secondly, Officer Miller's questions prior to asking to "just take a quick look" in the car were not specific. They did not indicate that Officer Miller would conduct a targeted search for drugs. Indeed, he asked a series of standard, general questions. He asked: 1) if there was anything he needed to be aware of, 2) if there was "weed" or anything like that, and 3) if there was "anything illegal" at all in the car. (Audio at 13:35 – 13:45.) These questions would lead a reasonable person to believe that when Officer Miller asked to "just take a quick look" in the car, he was not specifically interested in searching for drugs or anything else in particular. Reasonable people are obviously aware that officers are always on the lookout for evidence of some crime. Thus, the district court erred when it held that "a reasonable person would have understood from the exchange that Officer Miller intended to search for drugs." (R., p.110.)

Further, a "look" is not a "touch." The definition of the word "search" is to "look through or go over thoroughly to find something." *The Oxford English Reference Dictionary* 1306 (Judy Pearsall and Bill Trumble, eds., Oxford University Press 2nd ed. 1996). The definition of the word "look" is to "use one's sight; turn one's eyes in some direction." *Id.* at 846. The definition of the word "quick" is "taking only a short time." *Id.* at 1182. And finally, used in this context — as an adverb modifying the word "take" — the word "just" means "no more than." *Id.* at 768. Thus, "just take a quick look at" means to do no more than use one's sight for a short time only. In fact, one of the

synonyms for the word "glance" is a "quick look." Thesaurus.com, http://www.thesaurus.com/browse/glance (last visited Feb. 16, 2016). Therefore, the reasonable person would believe that an officer asking to "just to take a quick look at" the inside of a car would only be scanning the interior of the car for whatever is readily observable.

A request to "just take a quick look" is not equivalent to a request to "search," and a holding to that effect in this case would irrationally extend the United States Supreme Court's holding in *Jimeno*. There, the officer specifically overheard Mr. Jimeno arranging a drug transaction and later stopped him for a traffic infraction. *Jimeno*, 500 U.S. at 249. The officer then told Mr. Jimeno that he had reason to believe there were drugs in Mr. Jimeno's car and asked for consent to "search" the car, which Mr. Jimeno granted. *Id.* The officer then opened a paper bag located on the floor of the car and found contraband. *Id.* at 250. The issue was whether the scope of Mr. Jimeno's consent included a search of the paper bag.

The Court held, "In this case, the terms of the search's authorization were simple. [Mr. Jimeno] granted Officer Trujillo permission to search his car, and did not place any explicit limitation on the scope of the search." *Id.* at 251. The Court found that Mr. Jimeno's consent was a "general consent to search" the car and held that, because the officer told Mr. Jimeno that he thought there might be drugs in the car, a "reasonable person may be expected to know that narcotics are generally carried in some form of a container." *Id*. Therefore, the Court held that consent to "search" the vehicle "extended beyond the surfaces of the car's interior to the paper bag lying on the car's floor." *Id*.

The *Jimeno* Court found that an unqualified consent to an officer's request to "search" is a general consent. *Id.* And, in that specific situation — where the officer has reason to believe there are drugs in the car, and specifically asks about drugs — such a general consent to search gave the officer permission to search closed containers. *Id.* However, some courts have applied the rationale of *Jimeno* to situations where officers do not ask to "search" but instead use another term. Those courts have held that officers, after getting a person's consent to "look and see" or "look through," do not exceed the scope of that consent when they perform a search and/or open containers, so long as the officers indicate that the object of the search is drugs.[3] This appears to be based in large part on the fact that the *Jimeno* Court held that reasonable people would know that drugs are often kept in containers, and "[t]he scope of a search is generally defined by its expressed object." *Id.* (citing *United States v. Ross*, 456 U.S. 798 (1982)).

But the *Jimeno* Court analyzed an officer's request to "search," not a request to "just take a quick look at" the place to be searched. And, the request to search in *Jimeno* came after the officer asked specifically about drugs he had a strong reason to believe were in fact in the vehicle. As such, it was clear that the officer was searching for drugs. The *Jimeno* Court did not hold, however, that as long as an officer mentions

[3] *See, e.g.*, *State v. Silva*, 134 Idaho 848, 853 (Ct. App. 2000) (After asking whether there were drugs in the car, officer asked defendant if he would mind if the officer took a "look through" the defendant's truck and then found drugs under the floor mat.); *United States v. Lopez-Mendoza*, 601 F.3d 861, 868 (8th Cir. 2010) (Officer asked if defendant had drugs in car and then asked "Do you care if I look and see?" The court held that the officer "did not exceed the scope of Vargas–Miranda's consent by reasonably searching the car for drugs.").

drugs to the driver in a random traffic stop, the scope of any consent is unlimited, regardless of the ambiguity of the officer's request for consent.

An officer's use of terms other than "search" in a request to search increases the likelihood that the request is ambiguous, and that any subsequent consent would be limited to the words the officer used. A request to "just take a quick look at" the inside of a car does not convey a request to open and explore the contents of closed containers found inside the car.[4] Thus, when an officer asks to do something other than "search," he does so at his own risk because any consent will be limited to the words the officer used. If the officer does not limit his actions to those words, the consent cannot be considered knowing and voluntary. Here, Officer Miller requested to "just take a quick look." Therefore, Mr. Dias's consent was not general. In other words, the reasonable person observing the exchange would believe that consent to Officer Miller's request would lead only a quick look, not a search.

The Tenth Circuit's decision in *United States v. Wald*, 216 F.3d 1222 (10th Cir. 2000), is instructive on this point. In *Wald*, after stopping the car for a cracked windshield, the officer became suspicious that the men in the car might be using drugs and asked, "You wouldn't mind if I take a quick look would you?" *Id.* at 1228. Wald consented, and the officer looked in the interior of the car but found nothing. *Id.* at 1225. He then searched the trunk and noticed that the screws holding the speakers in

[4] The "quick look issue" has prompted at least one recent law review article: Alexander A. Mikhalevsky, The Conversational Consent Search: How "Quick Look" and Other Similar Searches Have Eroded Our Constitutional Rights, 30 Ga. St. U. L. Rev. 1077, 1086 (2014).

place "were marked up." *Id.* After opening the speakers, he discovered methamphetamine. *Id.*

The court held that a "reasonable observer of this exchange would not likely conclude that Wald gave [the officer] permission to search the vehicle's trunk." *Id.* at 1228. The same reasoning should apply here. Since Mr. Dias's consent was clearly limited by the nature of Officer Miller's request, an observer of the exchange would not conclude that the scope of Mr. Dias's consent extended to containers found in the car but rather only to readily observable items in the car. The questions asked by Officer Miller would not communicate that, by consenting, Mr. Dias was giving Officer Miller permission to search his personal containers. Indeed, the district court even went as far as to say that it believed Officer Miller "should have been more precise with his language by asking Defendant for permission to 'search' (nor is it an onerous burden on police officers to be more precise when seeking consent for a warrantless search) . . . ." (R., p.109.) Nevertheless, it denied Mr. Dias's motion to suppress.

In its denial, the district court noted that there was no Idaho case law specifically on point with this case. (R., p.106.) Therefore, the court relied on *State v. Silva*, 134 Idaho 848 (Ct. App. 2000) and *State v. Jones*, No. 36949, 2011 WL 11056704 (Idaho Ct. App. Aug. 2, 2011) (an unpublished decision),[5] to erroneously expand *Jimeno* to include Mr. Dias's situation. (R., pp.105-06.) However, Mr. Dias's situation is distinguishable from those cases.

In *State v. Silva*, the defendant filed a motion to suppress and argued that the

[5] The district court also relied on several federal Circuit Court of Appeals opinions. (R., pp.107-09.)

scope of his consent for the officer to take a "look through" his truck did not give the officer permission to then search the cab of the truck and under the floor mats. *Id.* at 853. The Court of Appeals found that "a reasonable and prudent officer would have viewed Silva's consent as permission to search the entire cab, including under the floor mats . . . ." *Id.* (citing *State v. Frizzel*, 132 Idaho 522, 524 n.1 (Ct. App. 1999)).[6] This case is distinguishable from *Silva* for two reasons. First, the officer in *Silva* requested to "look through" the truck, which connotes a more thorough inspection than a request to "just take a quick look." Second, the officer in *Silva* did not look in a closed container, but under a floor mat.

The district court also relied on an unpublished Idaho Court of Appeals opinion, which held that the *Jimeno* rationale applied to the search of a home: *State v. Jones*, No. 36949, 2011 WL 11056704. (R., p.106.) In *Jones*, officers told the defendant that they had received a call from someone saying that Mr. Jones was involved in the use or sale of drugs, and one officer sought the defendant's consent to search the home by asking if it was okay if he "looked around." *Id.* at *1. The defendant agreed, and the officer looked in a closed container in a closet and found drugs. *Id.* The court held that "a typical reasonable person would have believed" that, based on the entire conversation, such consent gave law enforcement permission to search the entire home, "including anywhere that drugs, the express object of the search, could be hidden." *Id.* at *4.

The facts of *Jones* are distinguishable from this case. In *Jones*, the officer specifically said that he had received a call that made him suspicious that Jones was

[6] The court in *Frizzel* relied on *Jimeno*.

involved in the use or sale of drugs. In that respect, the facts of *Jones* were more like those of *Jimeno*. Further, *Jones* did not involve a random traffic stop, as was the case here. In *Jones*, the officer came to Mr. Jones's house based on a tip that there were drugs in the house. And, he asked to have a "look around." Therefore, the reasonable person may have been made aware that the officer would be performing a more thorough examination of the premises for drugs. As such, *Silva* and *Jones* do not support the denial of Mr. Dias's motion.

The district court also erred in holding that, because Mr. Dias "did not limit the scope of his consent" by objecting during the search, the search was within the scope of his initial consent. (R., p.110.) The requirement to object, however, should only apply to a situation where the person has given a general consent to search. *Wald* specifically addressed this issue. It stated,

> As a general proposition, this court has determined that a defendant's "failure to object when the search exceeds what he later claims was a more limited consent[ ] is an indication the search was within the scope of consent." That rule, however, applies only when the defendant initially gave "a *general* authorization to search." Here, the district court found that Wald's initial consent was not general, but rather was limited to a "quick look inside the vehicle," a finding we affirm as not clearly erroneous.

Wald, 216 F.3d at 1228 (citations omitted).

The same reasoning should apply here. Once it is clear that a defendant's consent is limited because of the nature of the officer's request, the defendant should not need to further object to the scope of the search.

Furthermore, the district court did not inquire or make any factual findings with respect to whether Mr. Dias could have objected. He likely could not have in this situation because Officer Miller told him to sit on the bumper of the police vehicle, so he

almost certainly could not see what Officer Miller was doing in his car and would not have known when to object. (Audio at 13:10 – 13:20.) As such, the district court erred when it held that, because Mr. Dias did not object during the search, Officer Miller did not exceed the scope of Mr. Dias's consent.

CONCLUSION

Mr. Dias respectfully requests that this Court vacate the district court's order of judgment of conviction and reverse the order which denied his motion to suppress.

DATED this 7th day of April, 2016.

_____/s/_____
REED P. ANDERSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 7th day of April, 2016, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

KEVIN SCOTT DIAS
14 N ORCHARD ST
BOISE ID 83705

SAMUEL A HOAGLAND
ADA COUNTY COURTHOUSE
E-MAILED BRIEF

GEORGE C PATTERSON
ATTORNEY AT LAW
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

RPA/eas